

### § 3.904

### 38 CFR Ch. I (7–1–08 Edition)

(2) In title 18 U.S.C., sections 175, 229, 831, 1091, 2332a, and 2332b, for claims filed on or after December 17, 2003.

(3) In the Uniform Code of Military Justice, Articles 94, 104 and 106 (10 U.S.C. 894, 904, and 906);

(4) In the following sections of the Atomic Energy Act of 1954: Sections 222 through 226 (42 U.S.C. 2272–2276); and

(5) In section 4 of the Internal Security Act of 1950 (50 U.S.C. 783).

(b) *Effect on claim.* (1) Any person who is convicted after September 1, 1959, of subversive activities shall from and after the date of commission of such offense have no right to gratuitous benefits (including the right to burial in a national cemetery) under laws administered by the Department of Veterans Affairs based on periods of military, naval, or air service commencing before the date of the commission of such offense and no other person shall be entitled to such benefits on account of such person.

(2) The Attorney General will notify the Department of Veterans Affairs in each case in which a person is indicted or convicted of an offense listed in paragraphs (a)(1), (3), and (4) of this section. The Secretary of Defense or the Secretary of the Treasury, as may be appropriate, will notify the Department of Veterans Affairs in each case in which a person is convicted of an offense listed in paragraph (a)(2) of this section.

(c) *Presidential pardon.* Where any person whose right to benefits has been so terminated is granted a pardon of the offense by the President of the United States, the right to such benefits shall be restored as of the date of such pardon, if otherwise eligible.

(Authority: 38 U.S.C. 6105)

[27 FR 8591, Aug. 28, 1962, as amended at 38 FR 4511, Feb. 15, 1973; 38 FR 30106, Nov. 1, 1973; 53 FR 17934, May 19, 1988; 71 FR 44919, Aug. 8, 2006]

#### § 3.904 Effect of forfeiture after veteran's death.

(a) *Fraud.* Whenever a veteran has forfeited his or her right by reason of fraud, his or her surviving dependents upon proper application may be paid pension, compensation, or dependency and indemnity compensation, if otherwise eligible. No benefits are payable

to any person who participated in the fraud causing the forfeiture.

(Authority: 38 U.S.C. 6103(c))

(b) *Treasonable acts.* Death benefits may be paid as provided in paragraph (a) of this section where forfeiture by reason of a treasonable act was declared before September 2, 1959, and such benefits were authorized prior to that date. Otherwise, no award of gratuitous benefits (including the right to burial in a national cemetery) may be made to any person based on any period of service commencing before the date of commission of the offense which resulted in the forfeiture.

(Authority: 38 U.S.C. 6104(c))

(c) *Subversive activities.* Where the veteran was convicted of subversive activities after September 1, 1959, no award of gratuitous benefits (including the right to burial in a national cemetery) may be made to any person based on any period of service commencing before the date of commission of the offense which resulted in the forfeiture unless the veteran had been granted a pardon of the offense by the President of the United States. If pardoned, the veteran's surviving dependents upon proper application may be paid pension, compensation or dependency and indemnity compensation, if otherwise eligible, and the right to burial in a national cemetery is restored.

(Authority: 38 U.S.C. 6105(a))

[27 FR 8591, Aug. 28, 1962, as amended at 38 FR 30106, Nov. 1, 1973; 39 FR 13970, Apr. 19, 1974; 53 FR 16924, May 19, 1988]

#### § 3.905 Declaration of forfeiture or remission of forfeiture.

(a) *Jurisdiction.* At the regional office level, except in VA Regional Office, Manila, Philippines, the Regional Counsel is authorized to determine whether the evidence warrants formal consideration as to forfeiture. In the Manila Regional Office the Veterans Service Center Manager is authorized to make this determination. Submissions may also be made by the director of a service, the Chairman, Board of Veterans Appeals, and the General Counsel. Jurisdiction to determine

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whether the claimant or payee has forfeited the right to gratuitous benefits or to remit a prior forfeiture is vested in the Director, Compensation and Pension Service, and personnel to whom authority has been delegated under the provisions of §3.100(c).

(b) *Fraud or treasonable acts.* Forfeiture of benefits under §3.901 or §3.902 will not be declared until the person has been notified by the Regional Counsel or, in VA Regional Office, Manila, Philippines, the Veterans Service Center Manager, of the right to present a defense. Such notice shall consist of a written statement sent to the person's latest address of record setting forth the following:

(1) The specific charges against the person;

(2) A detailed statement of the evidence supporting the charges, subject to regulatory limitations on disclosure of information;

(3) Citation and discussion of the applicable statute;

(4) The right to submit a statement or evidence within 60 days, either to rebut the charges or to explain the person's position;

(5) The right to a hearing within 60 days, with representation by counsel of the person's own choosing, that fees for the representation are limited in accordance with 38 U.S.C. 5904(c) and that no expenses incurred by a claimant, counsel or witness will be paid by VA.

(c) *Subversive activities.* Automatic forfeiture of benefits under §3.903 will be effectuated by an official authorized to declare a forfeiture as provided in paragraph (a) of this section.

(d) *Finality of decisions.* A decision of forfeiture is subject to the provisions of §3.104(a) and §§20.1103 and 20.1104 of this chapter. The officials authorized to file administrative appeals and the time limit for filing such appeals are set forth in §19.51 of this chapter.

(e) *Remission of forfeiture.* In event of remission of forfeiture under §3.901(e), any amounts paid as an apportionment(s) during periods of the previously forfeited beneficiary's reentitlement will be offset.

CROSS REFERENCES: Effective dates; forfeiture. See §3.400(m). Reductions and discontinuances; fraud. See §3.500(k). Reductions and discontinuances; treasonable acts

or subversive activities. See §3.500(s). Adjustments and resumptions. See §3.669. Burial benefits. See §3.1609.

[28 FR 2234, Mar. 7, 1963, as amended at 29 FR 7547, June 12, 1964; 37 FR 19134, Sept. 19, 1972; 39 FR 13970, Apr. 19, 1974; 53 FR 17934, May 19, 1988; 58 FR 32443, June 10, 1993]

### PROTECTION

#### §3.950 Helpless children; Spanish-American and prior wars.

Marriage is not a bar to the payment of pension or compensation to a helpless child under an award approved prior to April 1, 1944. The presumption, arising from the fact of marriage, that helplessness has ceased may be overcome by positive proof of continuing helplessness. As to awards approved on or after April 1, 1944, pension or compensation may not be paid to a helpless child who has married.

[26 FR 1608, Feb. 24, 1961]

#### §3.951 Preservation of disability ratings.

(a) A readjustment to the Schedule for Rating Disabilities shall not be grounds for reduction of a disability rating in effect on the date of the readjustment unless medical evidence establishes that the disability to be evaluated has actually improved.

(Authority: 38 U.S.C. 1155)

(b) A disability which has been continuously rated at or above any evaluation of disability for 20 or more years for compensation purposes under laws administered by the Department of Veterans Affairs will not be reduced to less than such evaluation except upon a showing that such rating was based on fraud. Likewise, a rating of permanent total disability for pension purposes which has been in force for 20 or more years will not be reduced except upon a showing that the rating was based on fraud. The 20-year period will be computed from the effective date of the evaluation to the effective date of reduction of evaluation.

(Authority: 38 U.S.C. 110)

[34 FR 11970, July 16, 1969, as amended at 57 FR 10426, Mar. 26, 1992]